IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of:	No. 83544-6
JEFFREY COATS, Petitioner.	REPLY IN SUPPORT OF DISCRETIONARY REVIEW

I. INTRODUCTION

Jeffrey Coats, Petitioner, seeks discretionary review of an order dismissing his PRP. After the State failed to file a response to Petitioner's motion, this Court issued a *Ruling* directing the State to file a response.

That *Ruling* notes that Coats was "wholly misinformed of the maximum penalty for conspiracy to commit first degree robbery, not only in the judgment and sentence but in his plea statement." "If Mr. Coats's judgment contains a facial error the court may also be required to look into the validity of his plea agreement." *Ruling,* p. 2.

The State argues in response that Coats's judgment is not facially invalid, contradicting its earlier position conceding that Coats's "judgment contains a facial invalidity with respect to Count II." *Response to PRP,* p. 6. The State further argues that any remedy is limited to correcting the facial invalidity on the judgment, but that a post-conviction court cannot reach any infirmity found within the conviction itself.

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The State's earlier concession of facial invalidity was correct. As this Court recognized in its *Ruling,* a facially invalid judgment creates an exception to the one-year collateral attack time bar making an attack on the underlying judgment timely. A timely PRP can certainly be directed to the validity of a guilty plea. Because Coats's guilty plea was invalid, he is entitled to withdraw it.

This Court also directed the State to "discuss Mr. Coats's double jeopardy claim." *Ruling,* p. 2. The State's response completely avoids or ignores the merits of Coats's claim and instead argues only that this Court should refuse to consider the claim because it was not raised below. While this Court certainly has the discretion not to consider Coats's double jeopardy claim, it also possesses the discretion to accept review of that issue, as recent cases demonstrate.

II. ARGUMENT

Introduction

Coats's *Judgment* indicates that the maximum punishment conspiracy to commit first-degree robbery is "LIFE." In fact, the maximum term for conspiracy to commit first-degree robbery was 10 years in prison. *See* RCW 9A.20.021; 9A.28.040 (3)(b). Coats's judgment plainly and unambiguously reveals this error.

Like his judgment, Coats's written plea statement also contains misinformation about the maximum sentence for conspiracy to commit robbery, although that form incorrectly lists the maximum as "20 yr/$50,000." Both maximums on the plea form (the

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maximum term of imprisonment and the fine) are incorrect. Instead, the correct maximum for the conspiracy crime was 10 years and/or a $20,000 fine.

McKiearnan Did Not Alter What Constitutes a Facial Invalidity

Nevertheless, the State argues that this Court's recent decision in *Pers. Restraint Petition of McKiearnan,* 165 Wn.2d 777, 203 P.3d 375 (2009), requires more than an error on the "face" of the judgment—although the State never explains the additional requirement imposed by *McKiearnan.*

The State misreads *McKiearnan.*

As this Court stated in its *Ruling* the *McKiearnan* court simply found no facial invalidity because it concluded there was no error on the face of the judgment. "In this case, pursuant to the provisions of former RCW 9.94A.120, had the sentencing court found a substantial and compelling reason to do so it could have sentenced McKiearnan to a term within the standard range, to life imprisonment, or anywhere in between. The maximum was life in prison whether he was informed that the maximum sentence was 1 year to life, 10 years to life, or 20 years to life." Simply put, "McKiearnan was aware of the maximum amount of time he could serve in confinement." *Id.* at 782-83. Thus, *McKiearnan* represents nothing more than a reaffirmation of the earlier holding in *Pers. Restraint of Hemenway,* 147 Wn.2d 529, 533, 55 P.3d 615 (2002), where there is no error on the judgment any error on a guilty plea form is time barred, if raised more than a year after finality.

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In stark contrast, the judgment in the instant case contains an error, unmistakable from the face of the judgment—a point not disputed in the decision below or by the State.

Bradley Proves that Facial Invalidity Requires Only an Error on the Face of the Judgment

This Court then asked the State to discuss this Court's holding in *Pers. Restraint of Bradley,* 165 Wn.2d 934, 205 P.3d 123 (2009).

Because *Bradley* upends the State's interpretation of *McKiearnan*, the State only has one option: argue that *Bradley* was incorrectly decided. As a result, the State implicitly concedes that review is warranted because the decision of the Court of Appeals conflicts with a decision of this Court. RAP 13.4(b).

However, *Bradley* was correctly decided. *See In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 866, 50 P.3d 618 (2002) (facial invalidity means the judgment "without further elaboration" reveals the error, but is not limited to "constitutional infirmities.").

A PRP Attacking a Facially Invalid Judgment is a Timely PRP. A Timely PRP Can Attack the Conviction or the Sentence.

The State then argues that the remedy for a facial invalidity is limited to correction of the judgment and sentence. In order to achieve this result, *Bradley* must be overruled. So, once again, the State's argument supports granting review.

However, *Bradley* is not an outlier. Indeed, if a facial invalidity only results in correction of the error on the judgment this Court could have dealt with McKiearnan's request to withdraw his guilty plea in a much simpler manner. Instead, this Court clearly

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indicated that the validity of McKiearnan's plea was the next step, if his judgment had been found to contain a facial invalidity. According to the reasoning of the State, this Court was profoundly mistaken when it wrote: "In order to consider whether the plea agreement was invalid we must first find that the judgment and sentence itself is facially invalid. Otherwise, review of the plea agreement is barred by RCW 10.73.090." *McKiearnan,* 165 Wn.2d at 781. Once again, although Coats disagrees with the State's position, the arguments advanced by the State provide additional support for this Court's decision whether to grant review.

The State's citation to cases where post-conviction petitioners sought only correction of a sentencing error hardly provides support for the conclusion that the remedy for a facial invalidity is limited to sentencing relief.

Facial invalidity is an exception to the time bar. A facially invalid judgment makes a PRP timely. A timely PRP can challenge the sentence or it can challenge the validity of a conviction. In this case, Coats challenges the validity of his guilty plea—a point largely uncontested. Because Coats was misinformed about a direct consequence of his guilty plea, he is entitled to withdraw it. *See State v. Weyrich,* 163 Wn.2d 554, 557, 182 P.3d 965 (2008) ("Because Weyrich was misinformed that the statutory maximum sentence for the thefts was 5 years [rather than 10], he should have been allowed to withdraw his pleas.").

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This Court Has the Discretion to Accept Coats's Double Jeopardy Claim

The State does not respond to the merits of Coats's double jeopardy argument, probably because it is clear that Coats's two conspiracy convictions constitute one "unit of prosecution."

This Court recently decided a "unit of prosecution" case where, like here, the double jeopardy claim was not raised below. *State v. Jensen,* 164 Wn.2d 943, 195 P.3d 512 (2008) (decision below unpublished, but found at 135 Wn.App. 1001 (2006). Indeed, Jensen's petition for review did not even raise the unit of prosecution claim. *See* Case No. 79384-1). Nevertheless, the Court accepted reviewed, invited briefing on the issue, and reversed two of the four convictions.

This result is entirely consistent with RAP 13.6, which empowers this Court to "specify the issue or issues as to which review is granted."

Mr. Coats's double jeopardy claim is not subject to the time bar. RCW 10.73.100(3). It does not depend on extra-record facts. Thus, while Coats recognizes that this Court can choose not to consider this claim, for procedural or other reasons, it can also choose to grant review and specify consideration of Coats's double jeopardy claim.

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III. CONCLUSION

This Court should accept review, reverse and remand either permit Coats to withdraw his guilty pleas or for dismissal of once count of conspiracy and for resentencing.

DATED this 16th day of January, 2010.

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Enclosed please find Mr. Coats's reply in support of discretionary review, for filing. I have served opposing counsel by sending a copy of this email along with its attachment to DPA Proctor.

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